S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

REGINA WALLACE, Plaintiff-Appellant,	UNPUBLISHED July 31, 2014
v	No. 314577 Kent Circuit Court
GATOR FORE, INC., d/b/a DUTHLER FAMILY FOODS, Defendant-Appellee.	LC No. 11-002589-NO

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order setting aside a properly entered default and its subsequent order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) in this premises liability case. We conclude the trial court abused its discretion by setting aside the default pursuant to MCR 2.603(D)(1) and reverse. We vacate the trial court's grant of summary judgment to defendant and remand for trial on damages.

I. FACTS

Plaintiff slipped and fell on a puddle of clear liquid at a grocery store owned by defendant. After negotiating with defendant's insurance carrier, Zurich North America, plaintiff filed suit and properly served defendant with the summons and complaint. A default was subsequently entered when defendant failed to answer. Two months later, defendant moved the trial court to set aside the default, and the trial court granted defendant's motion. Thereafter, defendant moved for summary disposition. The trial court granted defendant's motion, finding there was no genuine issue of material fact and the puddle was an open and obvious danger.

II. SETTING ASIDE DEFAULT JUDGMENT

Plaintiff first asserts the trial court abused its discretion when it concluded there was good cause permitting it to set aside the entry of default. We agree. "The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court . . . Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999) (citation omitted). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d

132 (2007) (citation omitted). A court abuses its discretion when it makes an error of law. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

Except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default or a default judgment may be granted only if an affidavit of facts showing a meritorious defense is filed and good cause is shown. MCR 2.603(D)(1). In determining whether there is a meritorious defense and good cause, a trial court should consider the totality of the circumstances. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 236-238; 760 NW2d 674 (2008). In *Shawl*, this Court stated factors relevant to determining whether there is good cause under the totality of the circumstances:

> (1) whether the party completely failed to respond or simply missed the deadline to file; (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred; (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment; (4) whether there was defective process or notice; (5) the circumstances behind the failure to file or file timely; (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and (9) if an insurer is involved, whether internal policies of the company were followed. [*Id.* at 238.]

The court may consider whether allowing the default judgment to stand would result in manifest injustice, but only *after* the movant demonstrates a meritorious defense and good cause. *Alken-Ziegler*, 461 Mich at 233. "[M]anifest injustice is *the result* that would occur if a default were to be allowed to stand *where a party has satisfied the* '*meritorious defense*' *and* '*good cause*' *requirements* of the court rule." *Id.* (emphasis added).

In its order, the trial court found good cause was present *because* "manifest injustice would result in forcing Zurich to pay without an opportunity to defend the claim." Manifest injustice is not a discrete factor to consider in determining whether to set aside the default. *Id.* The trial court acted contrary to law by setting aside the default judgment because it did not properly determine whether good cause was present. The following properly conducted *Shawl* analysis yields a different result.

In this case there was no "reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler*, 461 Mich at 233. Defendant's argument centers around the fifth *Shawl* factor, "the circumstances behind the failure to file or file timely." *Shawl*, 280 Mich App at 238. Defendant argues it had a reasonable excuse justifying its failure to respond because plaintiff and Zurich were negotiating a settlement when plaintiff served defendant with the complaint, which provided defendant a basis for failing to understand the significance of the summons and complaint. This argument overlooks the fact that "service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 673-674; 413 NW2d 474 (1987). Regardless of whether there were ongoing negotiations between plaintiff and Zurich,

defendant was unquestionably provided notice of a suit against it when plaintiff's counsel properly served it with the complaint on March 23, 2011. Defendant's failure to respond appears completely unjustified considering the summons stated nothing about Zurich being sued; rather, the summons only stated that plaintiff was suing *defendant*. Further, defendant presented no facts suggesting it even attempted to verify its belief that plaintiff would notify Zurich of the suit against defendant.

Additionally, and even more importantly, what defendant characterizes as "negotiating" was simply plaintiff sending letters to Zurich and Zurich never responding. A consistent definition of "negotiate" can be found in case law and dictionaries. "In order to negotiate with another, there must be a purpose to bring about a purchase or sale, or to arrive at some kind of an understanding, bargain, or agreement." *People v Augustine*, 232 Mich 29, 35; 204 NW 747, 749 (1925). "To communicate with another party for the purpose of reaching an understanding" or "to bring about by discussion or bargaining." *Black's Law Dictionary* (9th ed). "To deal or bargain with another or others, as in the preparation of a treaty or contract" or "to bring about by discussion and settlement of terms." *Random House Webster's College Dictionary* (2005). These three definitions of the word "negotiate" are consistent and all imply that for there to be a negotiation, there must be intent and action on behalf of *both* parties. In this case, plaintiff's attorney sent Zurich three letters over a period of nearly two months. Zurich did not respond in any way until after default had been entered. Since there was no action by Zurich, any argument that there was a negotiation between the two parties is absurd.

While defendant's primary argument fails, *Shawl* requires us to consider the "totality of the circumstances." 280 Mich at 237. The first *Shawl* factor weighs in favor of plaintiff because defendant did not "simply miss[] the deadline to file," it "completely failed to respond." See *Shawl*, 280 Mich at 238. Defendant took no action whatsoever until nearly two months after the deadline for responding to the complaint. After the default was set aside, defendant responded to the complaint on September 19, 2011, nearly five months after plaintiff served defendant with the complaint and summons. The second *Shawl* factor is inapplicable, because, as detailed above, defendant did not "simply miss[] the deadline to file." *Id*. The third *Shawl* factor weighs in favor of plaintiff. Default was entered against defendant on May 27, 2011. Defendant did not file its motion to set aside the default until July 18, 2011. Defendant waited nearly two months to file its motion to set aside the default, demonstrating its continued willful disregard of the suit. The fourth *Shawl* factor weighs in favor of plaintiff, for it is undisputed the complaint and summons were properly served. The fifth *Shawl* factor, as described above, favors plaintiff. The sixth *Shawl* factor weighs in favor of plaintiff because defendant concedes it was served with the summons and complaint; thus, it is unquestionable that defendant knowingly failed to respond. The seventh and eighth *Shawl* factors are not applicable because they are only implicated when damages are awarded as a result of a default, see *id*., and no damages were awarded in this case.

The ninth *Shawl* factor is also inapplicable despite this case being one where an insurer is involved, because this is not a case where the *insurer's* negligence caused defendant's failure to respond to the complaint. See *id*. Rather, defendant was personally served with the complaint and Zurich was not named as a party. Additionally, the record indicates defendant did not notify Zurich of the suit until June 9, 2011, eleven days after default was entered and two and a half months after defendant was served with notice. Zurich retained counsel the day after becoming aware of the suit, so there was no negligence on its part.

We reverse the trial court's order setting aside the default, vacate the order granting defendant summary disposition, and remand the case for a trial on the amount of damages due to plaintiff. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck